APPENDIX — PETITION FOR DECLARATION DATED SEPTEMBER 30, 1996

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IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

May Term, 1986

No. 5388

PRINCE GEORGE CENTER, INC. and MBL LIFE ASSURANCE CORPORATION ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

UNITED STATES GYPSUM COMPANY, *et al.*,

Defendants.

PETITION FOR DECLARATION THAT THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, *ET. AL.*, IS NOT A CLASS MEMBER OR, ALTERNATIVELY, FOR *NUNC PRO TUNC* RULING THAT PRUDENTIAL'S SEPTEMBER 20, 1996 OPT-OUT FILING WAS TIMELY

The Prudential Insurance Company of America, and two of its wholly-owned subsidiaries ("Prudential"), by its undersigned attorneys, hereby petitions this Court for a declaration that Prudential is not a member of the class of settling plaintiffs who are bound by this Court's Order dated July 23, 1996, or, in the alternative, for a *nunc pro tunc* ruling that Prudential's September 20, 1996 opt-out notice was timely.

Prudential is a mutual company, incorporated in New Jersey, and has always had its corporate headquarters in Newark, New Jersey. It is not a Pennsylvania resident. Prudential makes this petition because it is not a member of the class. Further, for the past ten years Prudential has been engaged in an asbestos-property-damage action involving claims for several hundred million dollars in the United States District Court for the District of New Jersey (the "New Jersey Action").

Appendix

In March 1996, Prudential and all defendants in the New Jersey Action signed a Consent Order stating that 18 specifically-identified properties were the subject of the New Jersey Action and that all issues concerning those 18 properties would be ready for a comprehensive trial by December 1996. Since then, all parties have spent millions of dollars preparing for that trial in the New Jersey Action.

On September 13, 1996, however, two of the defendants in the New Jersey Action — United States Gypsum Company and W. R. Grace & Co. — announced for the *first time ever in the New Jersey Action* that they contend that claims relating to eight of the 18 properties (which are worth over $100 million) were settled as part of the settlement in this Pennsylvania state court class action.

This petition is therefore of extreme urgency. In support of this Petition, Prudential avers as follows:

A. *The New Jersey Action*[1]

1. In October 1987, Prudential filed the New Jersey Action in the United States District Court for the District of New Jersey against seven former manufacturers of asbestos-containing building products to recover the several hundred million dollars in costs Prudential has incurred and will incur in monitoring, removing and dealing with the defendants' asbestos-containing materials in specifically

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1. The facts are set forth in greater detail in the affidavits of Steven A. Lauer and Prudential's Counsel and the exhibits attached thereto, filed with this Petition.

identified properties. The current active defendants are United States Gypsum Company, W. R. Grace & Co., United States Mineral Products Company and Asbestospray Corporation (the "Active Defendants").[2] Two of those defendants — W. R. Grace and U. S. Gypsum — are represented by the same counsel in both the New Jersey and Pennsylvania Actions. Prudential has already spent more than $15 million litigating the New Jersey Action, which includes Federal RICO claims and common law and state (New Jersey) claims.

2. Originally the New Jersey Action involved claims related to asbestos-containing materials in 61 properties. The complaints listed, by name and address, each of the properties at issue in the litigation. In 1991, Prudential voluntarily dismissed the claims related to 22 properties, leaving 39 properties at issue.

3. On *March 26, 1996*, the United States District Court in the New Jersey Action entered an Order Establishing A Final Pretrial Schedule ("Pretrial Order"). In that Pretrial Order, with the *express written consent* of all parties:

> (a) Prudential voluntarily dismissed claims related to an additional 20 properties against the active defendants United States Gypsum Company, W.R. Grace & Co., United States Minerals Products Company, and

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2. Three other defendants — National Gypsum Company, Celotex Corporation, and Keene Corporation — had already filed for bankruptcy.

Asbestospray Corporation (the "Active Defendants").

(b) Prudential and defendants stipulated that "[t]he claims which *remain* against the active defendants involve claims relating to asbestos-containing materials alleged to be present in the eighteen (18) properties listed below . . . ." (emphasis added). The Order then went on to list by *name and address* the 18 properties remaining at issue.

(c) Certain defendants waived their rights to contest the issue of product identification related to all or substantial portions of nine of the 18 properties which remained at issue.

4. The Pretrial Order then went on to set forth an intense schedule under which all remaining discovery would be completed and the case would be fully pre-tried and ready for a comprehensive trial addressing *all* issues in *all* 18 remaining properties by December 2, 1996. Specifically, paragraph 9 of that Pretrial Order states:

> A final Pretrial Conference shall be held on December 2, 1996. At that conference, the final Pretrial Order will be entered and a date for *a comprehensive trial addressing all issues (including liability and damages) relating to all [18] properties identified in paragraph 3 of this Order shall be set* as soon thereafter as the schedule for the Court permits. (Emphasis added).

5. The Pretrial Order was the subject of extensive negotiations by the parties in February and March, 1996, under the direct supervision and with the direct participation of the United States Magistrate Judge. In the eight years of litigation leading up to 1996, the parties had engaged in massive discovery, including: (a) Prudential responding to 22 sets of interrogatories, containing over 700 individual interrogatories; (b) Prudential responding to 13 document demands and producing hundreds of thousands of pages of documents; and (c) defendants conducting over 260 depositions and receiving transcripts of almost 80 other depositions. The parties had also filed numerous motions on the pleadings and a series of summary judgment motions, as well as proceeding before the Third Circuit Court of Appeals.

6. Concerned with bringing to trial the merits of this tremendously expensive litigation, Prudential brought a motion in December 1995, for an immediate separate trial on its claims related to a subset of less than all properties. Defendants opposed that motion for an immediate limited trial, and instead argued for the completion of all remaining discovery on all properties and a trial in December, 1996.

7. The Order Establishing A Final Pretrial Schedule was the resulting compromise. The first four paragraphs of that Pretrial Order were consented to by all active parties, including defendants, *United States Gypsum*, *W.R. Grace*, U.S. Mineral Products, and Asbestospray. In paragraphs 1 and 2, Prudential voluntarily dismissed claims relating to 20 properties against the defendants. In March 1996, when Prudential took that action, defendants knew that Prudential

claimed to have suffered damages of approximately $30 million in the 20 properties it was voluntarily dismissing. Prudential's dismissal was in exchange for a Pretrial Order establishing a firm schedule to have the remaining claims ready for *a comprehensive trial addressing all issues in all 18 remaining properties in December 1996.*

8. Following the entry of the Pretrial Order on March 26, 1996, Prudential and defendants engaged in additional massive and intense discovery related to all 18 remaining properties at issue in the action. In accordance with the Order, the discovery which has taken place between March, 1996 and September, 1996 has included:

(a) 11 sets of interrogatories served by defendants, 9 sets of which had over 200 specific interrogatories directed to the properties at issue in this action;

(b) physical inspections by defendants and their experts of the properties at the various property locations throughout the United States;

(c) multiple separate document reviews at the various properties, during which defendants demanded and received over 750,000 pages of additional documents from the various properties;

(d) over 130 additional depositions noticed by defendants, many of which were specifically

identified by defendants as dealing with property-specific issues;

(e) the identification of 33 experts by the parties and the production of multiple and voluminous expert reports. Those expert reports, including the written reports produced by defendants on September 1, 1996 and September 16, 1996, expressly addressed building-specific issues on all 18 properties at issue in this action.

9. On September 13, 1996, counsel for two of the defendants in the New Jersey Action — U.S. Gypsum and W. R. Grace — announced for the first time ever that they contended that claims related to eight of the 18 properties in the New Jersey Action, which are worth over $100 million, had been settled as part of the settlements in this Pennsylvania state court class action.

10. Despite that contention, the intensive discovery, including the property-specific discovery as to all 18 properties, is still ongoing in the New Jersey Action. In accordance with the Pretrial Order that discovery is scheduled to be completed by October 31, 1996. In fact, at depositions as recently as September 25, 1996, counsel for defendants, including counsel for W.R. Grace and U.S. Gypsum, have *specifically identified by name all 18 properties as the building which are at issue* in the New Jersey Action and have *repeatedly asked questions about all 18 properties*. Twenty-four more depositions are currently scheduled to take place in October, 1996, and

additional discovery remains to be scheduled. Those depositions will continue to address issues specific to all of the 18 properties involved in the New Jersey Action.

B. *The Pennsylvania Action*

11. Prudential has investigated defendants' recently announced contention and, to date, has learned the following about this Pennsylvania action.[3]

12. In May 1986, *Prince George Center, Inc. et al. v. United States Gypsum Company, et al.* (the "Pennsylvania Action" or the "Class Action") was filed in the Court of Common Pleas of Philadelphia County.

13. The first time a class was certified was April 1992. The class was described as:

> all private owners of a building or building(s) (within the District of Columbia and the 50 states) that were leased or sub-leased in whole or in part to the federal government, or an agency, department or unit thereof, on or after May 30, 1984, in which building(s) asbestos-containing material was or is present.

14. Apparently no notice concerning that class certification was sent out at that time to any potential class member.

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3. Since Prudential was not a party to the Pennsylvania action, and has only recently begun to investigate a rather lengthy record, it is summarizing the relevant facts as it now understands them. Prudential reserves the right to supplement its Petition.

15. In February 1995, the Court decertified the class which it had certified in April 1992, and certified a "Settlement Class" and "Conditionally Certified" trial class.

16. The "Settlement Class" related to settlements in the amount of approximately $3.8 million previously entered into between the plaintiffs in the Class Action and 24 defendants other than the four Active Defendants, that is, other than U.S. Gypsum, W. R. Grace, United States Mineral Products Company and Asbestospray Corporation.

17. The "*CONDITIONALLY CERTIFIED*" trial class consisted of:

> all private owners of buildings in the United States who, at any time between May 30, 1984 and December 22, 1994 inclusive, (1) leased or subleased their building(s) in whole or in part to the United States or any agency thereof; and (2) at any time during such period their building(s) contained asbestos or asbestos products; and, (3) the asbestos or asbestos products in their building(s) were manufactured, sold or installed by United States Gypsum and/or U.S. Mineral Products Company, and/or W.R. Grace & Company and/or Asbestospray Corp., or their building(s) is (are) in a state whose law permits such an owner to establish joint and several liability for conspiracy or concert of action, against not only the maker or seller of asbestos or asbestos products in his/her/its building(s) but also, others who acted in concert or conspiracy

> with him/her or it to misrepresent or withhold from the public, knowledge of the hazards of asbestos. . . .

18. In the February 17, 1995 Order, the Court also stated:

> Since all parties agreed that one or more of the four non-settling defendants [United States Gypsum, W.R. Grace, U.S. Mineral Products Company, and Asbestospray] may be liable only if: (1) a class member's building(s) contained an asbestos product or product manufactured, sold or installed by it (them) *or* (2) a class member's building is a state whose law permits imposition of liability upon it (them) upon a theory of concert of action or conspiracy with the party who made, sold or installed the asbestos product in a class member's building even though its (their) product(s) is (are) not in a class plaintiff's building, the trial class has been conditionally re-certified to reflect this reality.

19. In March 1995, a "Notice Of Proposed Settlement With Twenty-Four Defendants And Hearing To Approve These Settlements," was sent out to some tens of thousands of potential class members.

20. The notice stated that the proposed settlement class was an opt-out class.

21. A notice was sent to a Prudential office located in Dallas, Texas. That notice was later forwarded internally

to Prudential's Headquarters in Newark, New Jersey, and an Exclusion Request was sent to and *received by* the Court in April 1995. That Exclusion Request identified Mr. Lauer as the Prudential spokesman concerning the Class Action and set forth his address and title. (*See* Affidavit of Steven A. Lauer.)

22. Prudential believes that in May 1995, it sent out a letter request to be excluded from "any class or future class to be certified" in the Class Action. Prudential's available records do not yet confirm that this request was actually mailed out and its recent search of this Court's file did not disclose receipt of the May 1995 opt-out request. (*See* Affidavit of Steven A. Lauer.)

23. On October 10, 1995, United States Gypsum entered into a Settlement Agreement with the named plaintiffs in the Class Action for a promise of future payment of $ 3.6 million.

24. On February 28, 1996, W.R. Grace entered into a Settlement Agreement with the named plaintiffs in the Class Action for promise of future payment of $4 million.

25. On March 15, 1996, *plaintiff's counsel in the Class Action hand-delivered to the Court and to counsel for defendants U.S. Gypsum, W.R. Grace, U.S. Mineral Products Company, and Asbestospray, a "list of names and last known addresses of potential trial class members."*

26. On April 24, 1996, the Court entered an "Order Approving Notice and Summary Notice of Proposed Trial

Class Settlements And Of A Hearing On The Final Approval Of The Settlements." That Order concerned the settlements which United States Gypsum had entered on October 10, 1995 and W.R. Grace had entered into on February 28, 1996.

27. The Notice stated that it was an opt-out class, but did *not* state what buildings it covered; Prudential has owned over 1000 buildings at various times and it is still uncertain which of those buildings are allegedly included.

28. Notices were apparently sent out.

29. *No Notice* was sent to Prudential's Assistant General Counsel who executed and filed the Exclusion Form a year before.

30. *No Notice* was sent to Prudential's Headquarters.

31. *No Notice* was sent to Prudential's counsel-of-record in the New Jersey Action. (See Part B of this Petition, *infra.*)

32. The name "Prudential" appears on the list of names and last known addresses of potential class members several times. None of the listed addresses are for Prudential's Newark, New Jersey Headquarters; rather, the addresses are for locations in Boston, Massachusetts, Chicago, Illinois, Portland, Oregon, and Southfield, Michigan. At present, Prudential has not been able to confirm that any of those notices were received. It is clear, however, that *none of those Notices* ever found their way to Mr. Lauer, to Prudential Headquarters, or to outside counsel responsible for the conduct of the New Jersey Action.

33. The Court Order entered on April 24, 1996, required notice to be sent to "any additional potential Trial Class members whose name and deliverable addresses since March 15, 1996 become known to plaintiffs."

34. On August 13, 1996, the Court entered on its docket a Final Order and Judgment Approving A Settlement with United States Gypsum, W.R. Grace, United States Mineral Products Company, and Asbestospray Company ("Settlement Order"). The Settlement Order bore a date of July 23, 1996.

35. If that Order were treated as a final judgment, the 30-day time for appeal would have expired at the end of business on September 13, 1996.

36. At 5:02 p.m. on September 13, 1996, the 30th day after the August 13 Order was entered, a fax letter of counsel for United States Gypsum and W.R. Grace, contending that Prudential is a member of the Pennsylvania state court class, was sent to the counsel responsible for prosecuting Prudential's New Jersey Action.

37. One week later, on September 20, 1996, following some preliminary investigations, Mr. Lauer executed the opt-out form on behalf of Prudential and it was filed with this Court on that same date. (See Affidavit of Steven A. Lauer.)

Appendix

C. *Defendants' Failure to Disclose the Class Action Developments*

38. None of the defendants, or their attorneys, disclosed any of the developments in the Pennsylvania Action to either Prudential or its attorneys in the New Jersey Action. For example,

(a) No mention was made during any of the negotiations or discussions leading up to or involving the entry of the Order Establishing A Final Pretrial Schedule, which was entered in the New Jersey Action on March 26, 1996.

(b) No mention was made during any of the Court conferences, which took place between March and September 1996, when the Court, usually at the request of the defense counsel, dealt with issues relating to the buildings defendants now claim were already settled in the Class Action.

(c) No mention was made when the Court in June, 1996 granted the pro hoc admission of a partner of the Hoyle, Morris & Kerr firm to represent W.R. Grace in the New Jersey Action; that firm is also counsel of record to W.R. Grace in the Class Action.

(d) No mention was made at any time in April, May and June, 1996 while Prudential was responding to hundreds of Interrogatories served by defendants which requested information from the very buildings defendants now claim were already settled in the Class Action.

(e) No mention was made at any time in April, May and June, 1996 when defendants conducted numerous documents and physical inspections at some of the very buildings defendants now claim were already settled in the Class Action.

(f) No mention was made at any time in April, May, June and July, 1996 when defendants demanded and received the production of hundreds of thousands of pages of additional documents related to some of the buildings defendants now claim were already settled in the Class Action.

(g) No mention was made at any time during June through September 12, 1996, when defendants attended over 65 depositions conducted in the New Jersey Action and when defendants asked numerous questions related to most, if not all, of the buildings defendants now contend were already settled in the Class Action.

(h) No mention was made at any time during March through August, 1996 when defendants knew Prudential's experts were preparing extensive and detailed expert reports addressing all of the eight buildings defendants now claim were already settled in the Class Action.

(i) No mention was made at any time during August, 1996 when Prudential had produced its expert reports addressing issues on all 18 properties at issue in the New Jersey Action and when

defendants demanded over 80,000 pages of additional back-up documents to Prudential's expert reports, a large volume of which related only to the nine buildings defendants now claim were already settled in the Class Action.

(j) No mention was made at any time before September 12, 1996, when defendants produced their own expert reports, which reports directly address issues involved in the eight buildings defendants now claim were already settled in the Class Action.

(k) In fact, at depositions as recently as September 25, 1996, defendants stated that all 18 buildings were at issue.

39. Simultaneously with filing this Petition in this Pennsylvania Action, Prudential has filed motions with the United States District Court in the New Jersey Action. The motions in the New Jersey Action seek declaratory and equitable relief for reasons separate from the grounds for the Petitions in this action. The motions in the New Jersey Action, moreover, do not challenge or seek to undo the judgment in this Pennsylvania Action.

WHEREFORE, Prudential respectfully requests that this Court declare that Prudential is not a member of any class in this action and is not bound by any settlement or judgment in this class action. In addition or, in the alternative, Prudential requests a *nunc pro tunc* ruling that Prudential's September 20, 1996 Exclusion Request was timely and excluded Prudential from this class action.

Prudential also requests any additional relief this Court deems appropriate.

Prudential respectfully requests oral argument on this Petition.

RESPECTFULLY SUBMITTED,

HANGLEY, ARONCHICK,
SEGAL & PUDLIN

By: s/ Regina A. Vogel
Regina A. Vogel
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745 Property Investments

Of Counsel:

RIKER, DANZIG, SCHERER, HYLAND
& PERRETTI

DATED: September 30, 1996

Appendix

VERIFICATION

I, STEVEN A. LAUER, hereby state that I am an Assistant General Counsel to The Prudential Insurance Company of America, and as such I am authorized to make this Verification on its behalf and on behalf of two of its wholly-owned subsidiaries, PIC Realty Corporation and 745 Property Investments. I verify that I have read the foregoing Petition, and the facts set forth therein are true and correct to the best of my knowledge, information and belief.

I understand that the statements made herein are made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.

Dated: September 30, 1996

s/ Steven A. Lauer
STEVEN A. LAUER